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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LASHEILA HEBERT,

Plaintiff and Appellant,

v.

SPECIALIZED DAYCARE SERVICES, INC.,

Defendant and Respondent.

C085093

(Super. Ct. No.
34201400163076CUWTGDS)

Appellant LaSheila Hebert brought this employment action against her former employer, Respondent Specialized Daycare Services, Inc., after her termination. Based on her voluntary dismissal of her remaining causes of action, she appeals the trial court's order dismissing her first, fourth, fifth, and sixth causes of action for disability discrimination in violation of the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), retaliation (FEHA), retaliation (Lab. Code, § 1102.5), and wrongful termination in violation of public policy. We conclude this order is appealable,

but Hebert has not demonstrated a triable issue of fact as to any of these claims.

Accordingly, we affirm the judgment.

I. BACKGROUND

A. Factual Background

Respondent Specialized Daycare Services, Inc. does business as My Friends Pediatric Day Healthcare Center (My Friends). My Friends operates pediatric day health and respite care facilities for medically fragile children.

Hebert worked as a personal care attendant and shuttle driver at My Friends' Stockton facility. Hebert's direct supervisor during the entire time she was employed there was the Charge Nurse. The Charge Nurse was supervised by the Operations Nurse Manager for My Friends' Elk Grove, Stockton, and Orangevale locations.

On July 2, 2013, Hebert was diagnosed with a left trapezius strain. My Friends received work status reports restricting the amount of weight Hebert could push, pull, or lift to 20 pounds and then 10 pounds. In her deposition, Hebert explained she informed the Charge Nurse of these restrictions and asked for help lifting or doing diaper changes, or for a different assignment. Hebert said no changes were made. She asked nurses for help to no avail.

Hebert's daughter was also employed by My Friends and supervised by the Charge Nurse. Hebert's daughter was fired on September 3, 2013. The following day, the Charge Nurse reported that, when she greeted Hebert, Hebert responded by giving her a rude look and rolling her eyes. Later, Hebert initially did not respond to a work-related question and then responded rudely when the Charge Nurse asked again. The Charge Nurse reported this conduct to the Nursing Supervisor and the Vice President of My Friends. When the Nursing Supervisor arrived at the Stockton facility later that day, Hebert ignored her greeting as well, glared at her, and then slammed a door when leaving her presence. The Nursing Supervisor reported this to the Vice President and the

Director of Nursing. The Charge Nurse and the Nursing Supervisor also documented their observations.

On September 5, 2013, Hebert ignored the Charge Nurse's greeting and spoke to other staff members rather than the Charge Nurse about work issues. The Charge Nurse documented this behavior as well.

On the same day, Hebert requested a meeting to the Operations Nurse Manager. The meeting was also attended by the Charge Nurse, the Vice President, and the Director of Nursing. During the meeting, Hebert accused the Charge Nurse of bringing a firearm to work in July 2012 and June 2013, and overdosing on Percocet in July or August 2013. Hebert also claims she complained that her work restrictions were not being addressed.¹ After the meeting, Hebert left work before the end of her shift. Hebert said the Operations Nurse Manager told her that, if she needed to, she could leave. The Director of Nursing testified at her deposition that she was told Hebert left early without asking or notifying anyone she was leaving.

After the meeting, the Vice President and the Director of Nursing spoke to the Charge Nurse about Hebert's allegations. The Charge Nurse denied that any of what Hebert said was true. She explained that she was on Percocet because of a surgery, but had not attempted suicide. The Charge Nurse also denied ever bringing a gun to work. The Director of Nursing spoke with two individuals Hebert identified as having seen the Charge Nurse bring a gun to work, and both of them said they had never seen a gun at work or in the parking lot. The Director of Nursing talked to other people, but these were the only employees at the Stockton facility she asked directly about the gun. The Director of Nursing wrote an internal memorandum detailing each conversation. The seriousness of the gun accusation, the fact it could not be corroborated by the individuals

¹ My Friends' evidence is to the contrary.

Hebert said would corroborate it, that the accusations related to alleged incidents that were not recent, and were made the day after Hebert's daughter was fired, led the Vice President and the Director of Nursing to conclude that Hebert made her complaints maliciously because she was upset her daughter had been fired. Hebert's employment with My Friends was terminated on September 6, 2013. The Vice President and the Director of Nursing made the decision to do so. The primary basis for their decision was that Hebert had leveled what they determined to be false and malicious claims against an employee.² The Vice President also took into consideration the fact that she had been told Hebert left work early on September 5, 2013, without permission and that it had been reported that Hebert had displayed a rude and insubordinate attitude after her daughter's termination.

Hebert testified that, on September 3, 2013, the day her daughter was fired, she made an anonymous complaint to the State Department of Public Health about the Charge Nurse bringing a firearm into the center and trying to overdose on Percocet. The Vice President and Director of Nursing believed Hebert's daughter made the complaint because she told the Director of Nursing that she would and that she had already done so. Hebert also testified that she made a complaint on September 6, 2013. Hebert did not know if anyone at My Friends suspected she made a complaint prior to her termination. Prior to her deposition, she did not tell anyone other than her attorney that she made the September 3 complaint.

A health facilities evaluator nurse for the State Department of Public Health came to My Friends to investigate various complaints. She interviewed staff and was not able to substantiate the allegations that Hebert attributed to her September 3, 2013, complaint.

² The employee handbook prohibits "[d]ishonesty of any kind in relations with the Company" as well as "[m]aking malicious, false, or derogatory statements that may damage the integrity or reputation of the Company or its employees."

B. Procedural Background

Hebert filed this action against My Friends stating nine causes of action:

(1) disability discrimination in violation of FEHA, (2) failure to accommodate (FEHA), (3) failure to engage in the interactive process (FEHA), (4) retaliation (FEHA), (5) retaliation (Lab. Code, § 1102.5), (6) wrongful termination in violation of public policy, (7) failure to provide meal and rest breaks, (8) failure to pay wages upon termination, and (9) failure to maintain accurate wage records.

My Friends moved for summary judgment or, in the alternative, summary adjudication. The trial court denied My Friends' motion for summary judgment but granted My Friends' alternative motion for summary adjudication as to Hebert's first, fourth, fifth, and sixth causes of action. As relevant to this appeal, the trial court concluded that after My Friends introduced evidence of legitimate business reasons for Hebert's termination, Hebert did not produce sufficient evidence to raise a triable issue and overcome summary judgment as to those causes of action.

On January 4, 2017, Hebert dismissed her second and third causes of action without prejudice. On May 16, 2017, Hebert dismissed her remaining causes of action with prejudice. On July 6, 2017, Hebert filed a notice of appeal.

II. DISCUSSION

A. Appealability

My Friends argues this appeal must be dismissed for lack of jurisdiction because it violates the "one final judgment" rule codified in Code of Civil Procedure section 904.1, subdivision (a). "Subject to exceptions not applicable here, that subdivision authorizes appeal '[f]rom a judgment, except . . . an interlocutory judgment,' i.e., from a judgment that is not intermediate or nonfinal but is the one final judgment. [Citation.] Judgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, have the finality required by section 904.1, subdivision (a). A judgment that disposes of *fewer* than all of the causes of

action framed by the pleadings, however, is necessarily ‘interlocutory’ (Code Civ. Proc., § 904.1, subd. (a)), and not yet final, as to any parties between whom another cause of action remains pending.” (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.) The trial court only granted summary adjudication as to Hebert’s first, fourth, fifth, and sixth causes of action. An order granting summary adjudication of certain claims is generally reviewable on appeal from the final judgment in the action. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128.) My Friends argues no final judgment has been entered by the trial court. We conclude the court’s order granting summary adjudication of some of Hebert’s causes of action, combined with her dismissal of her remaining causes of action “had the legal effect of a final, appealable judgment.” (*Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 974 [“the court’s order sustaining the demurrers without leave to amend, combined with the dismissal of the action, had the legal effect of a final, appealable judgment”].) Accordingly, we will turn to Hebert’s claims on the merits.

B. Summary Judgment

We begin by summarizing several principles that govern the grant and review of summary judgment motions under Code of Civil Procedure section 437c.

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; see also Code Civ. Proc, § 437c, subd. (c).) On appeal, “[w]e review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.” (*Merrill v. Navegar, Inc., supra*, at p. 476.) A defendant moving for summary judgment “bears the burden of persuasion that ‘one or more elements of’ the ‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; see also Code Civ. Proc,

§ 437c, subd. (p)(2).) The defendant “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) Once the defendant meets its initial burden, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Id.* at pp. 849-850.)

“While we must liberally construe plaintiff’s showing and resolve any doubts about the propriety of a summary judgment in plaintiff’s favor, plaintiff’s evidence remains subject to careful scrutiny. [Citation.] We can find a triable issue of material fact ‘if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ ” (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) Moreover, we must also keep in mind “ ‘[a] judgment or order of the lower court is *presumed correct*’ ” and “ ‘error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) “Under this principle, [appellant] bear[s] the burden of establishing error on appeal, even though [respondent] had the burden of proving its right to summary judgment before the trial court. [Citation.] For this reason, our review is limited to contentions adequately raised in the [appellant’s] briefs.” (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 645.) Moreover, any arguments raised or only supported by authority on reply have been waived. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

Hebert’s briefing is conspicuous for its shortage of citations to evidence in the record. “ ‘The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.’ [Citations.] It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant’s contentions on appeal. [Citation.] If no citation ‘is furnished on a particular point, the court may treat it as waived.’ ” (*Guthrey v. State of California* (1998) 63

Cal.App.4th 1108, 1115.) “[A] separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion. In an appellate brief, an assertion of fact should be followed by a citation to the page(s) of the record containing the supporting evidence,” not to the separate statement. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4.) Likewise, citations to briefs submitted in the trial court are “obviously . . . not to admissible evidence in the record that indicates a triable issue of fact exists.” (*Guthrey v. State of California, supra*, at p. 1115 [appellant cited to briefing in support of motion for summary judgment].) With these principles in mind, we now turn to the issues that Hebert has properly tendered to us.

1. McDonnell Douglas Framework

In FEHA employment discrimination cases that *do not* involve mixed motives, our Supreme Court has adopted the three-stage burden-shifting test established by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*): “[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer’s proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff.” (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214-215.) A similar analysis applies to claims for retaliation under FEHA and Labor Code section 1102.5. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.) “To establish a prima facie case of retaliation, the plaintiff must show (1) he or she engaged in a protected activity; (2) the

employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation 'drops out of the picture,' and the burden shifts back to the employee to prove intentional retaliation." (*Ibid.*) As set forth above, the trial court concluded that after My Friends introduced evidence of legitimate business reasons for Hebert's termination, Hebert did not produce sufficient evidence to raise a triable issue and overcome summary judgment as to her first, fourth, fifth, and sixth causes of action. Hebert contends the trial court erred in applying the *McDonnell Douglas* framework at all because this is a mixed-motive case.³

A mixed-motive case is one "where both legitimate and illegitimate reasons motivated the decision." (*Desert Place, Inc. v. Costa* (2003) 539 U.S. 90, 93.) A "legitimate" reason in this context is a lawful, nondiscriminatory reason for termination. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 225.) Hebert has not demonstrated any error in the trial court's application of the *McDonnell Douglas* framework. Where she cites evidence in the record, it is insufficient to support her claim that this is a mixed motive case. For instance, she cites the entirety of a document created by the Director of Nursing memorializing the September 5, 2013, meeting in support of her assertion that "[a] reasonable jury could easily conclude that the witnesses told [the Director of Nursing] and [the Vice President] that they couldn't recall seeing a

³ The trial court explained that Hebert's sixth cause of action is predicated on My Friends' termination in violation of FEHA and the Labor Code. Hebert offers no specific argument that her claim for wrongful termination in violation of public policy should have survived summary adjudication independent of her claim that a mixed-motive analysis should have applied. Therefore, we do not address it individually either.

gun either to protect [the Charge Nurse] or to avoid retaliation from management for reporting what they saw.” The memorandum only records Hebert’s similar speculation at the time of the meeting. Hebert also cites to evidence she was told that there were multiple reasons for her firing, and that after she disputed leaving work early without permission, she was told she made unfounded accusations against an employee. This evidence is not sufficient to necessitate the application of a mixed-motive analysis rather than the *McDonnell Douglas* framework. Nor is the temporal proximity between Hebert’s termination and her giving notice of her disability or complaining about her Charge Nurse. (*Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 357.) Hebert has failed to demonstrate this was a mixed-motive case.

2. *Alleged Weighing of Evidence*

Hebert argues the trial court based its decision to grant summary adjudication as to some of her claims on an improper weighing of the evidence. This argument is largely devoid of supporting citations to the record. Hebert only cites the trial court’s ruling once, where it states, “Evidence that [the Charge Nurse] misused Percocet a month before the meeting does not undermine the genuineness of [the Director of Nursing]’s and [the Vice President]’s belief that Hebert falsely accused [the Charge Nurse] of bringing a loaded firearm to work.” The court’s analysis continues: “[The Director of Nursing] testified that, notwithstanding the importance of the drug issues Hebert raised, her primary concern was the possibility of a loaded gun at work. [Citation.] That Hebert may have been honest in some or all of her accusations about [the Charge Nurse]’s drug use is not substantial evidence that [the Director of Nursing] and [the Vice President] did not genuinely believe she lied about seeing [the Charge Nurse] with a loaded gun [at] work. Nor is it substantial evidence that [the Director of Nursing] and [the Vice President] terminated Hebert out of discriminatory animus.” This passage reflects that the trial court was properly engaged in the third step in the *McDonnell Douglas* framework. “[T]o avoid summary judgment, an employee claiming discrimination must

offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.) " "The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. [Citations.] Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." ' ' ' (*Id.* at p. 1005.) Hebert cites nothing in the record before us to demonstrate that the Percocet allegation was truthful. But even if she had, that there may have been some actual truth behind this allegation is insufficient for a reasonable trier of fact to infer that My Friends' stated reasons for firing Hebert were unworthy of credence and My Friends in fact fired her for improper reasons. Nor is Hebert's speculation that her co-workers' did not corroborate her claim that the Charge Nurse brought a gun to work because they wanted to keep their jobs and not get a friend and supervisor in trouble. "[S]peculation cannot be regarded as substantial responsive evidence" sufficient to avert summary judgment after the employer has shown a legitimate reason for discharging the employee. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

Hebert asserts she was not motivated by her daughter's termination to make the allegation that the Charge Nurse brought a gun to work because she had made the same

allegation to a coworker months before.⁴ The record indicates this coworker never told anyone about this allegation. Therefore, this fact has no bearing on our analysis of My Friends' actions. "It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case." (*King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at p. 436.) Hebert's arguments are insufficient to undermine the legitimacy of the reasons given for her termination.

3. *First Cause of Action for Discrimination*

Hebert contends summary adjudication was improperly granted as to her first cause of action for disability discrimination because she presented evidence that created a triable issue of fact as to whether her termination was motivated by a discriminatory animus based on her disability. She appears to argue she presented direct evidence of discriminatory animus in the termination decision that obviates the need to use the *McDonnell Douglas* framework. "[T]here is no need to engage in this burden-shifting analysis where there is direct evidence of discriminatory animus. [Citation.] [¶] Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550.) But after introducing this body of law, Hebert does not describe any direct evidence of discriminatory animus. If Hebert complained about a failure to accommodate her disability and was later subject to the Charge Nurse's "nitpicking," that is at best circumstantial evidence and the *McDonnell Douglas* framework applies. Regardless, Hebert's claim that she presented a triable issue of fact is forfeited by her failure to cite any actual supporting evidence to advance this argument.

⁴ Hebert's assertion that this individual was an "occasional member" of My Friends' management team is not supported by the record.

4. *Fourth Cause of Action for Retaliation (FEHA)*

Hebert contends summary adjudication was improperly granted as to her fourth cause of action because triable issues of fact exist as to whether My Friends terminated her in retaliation for having engaged in activities protected under FEHA. She argues, with almost no citation to evidence, that she provided substantial evidence from which a trier of fact could infer that My Friends' explanation for her termination was pretextual. The only actual evidence she cites are notes the Nursing Supervisor made regarding Hebert's conduct on September 4, 2013. The citation is offered to support Hebert's assertion that her supervisors "materially contributed" to her termination under *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95. Her argument is incomplete because contribution alone does not prove discrimination. *Reeves* explained that a defendant cannot negate the element of causation by showing the decisionmaker's ignorance of the plaintiff's protected conduct where "other substantial contributors to the decision *bore the requisite animus*." (*Id.* at p. 110, emphasis added.) Even assuming these notes contributed substantially to the decision to fire Hebert, the fact that she was criticized after she complained of a lack of accommodation is not sufficient for Hebert's claim to survive summary adjudication. (*Arteaga v. Brink's, Inc., supra*, 163 Cal.App.4th at p. 353 ["[T]emporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination".]) Hebert has not demonstrated the trial court erred in dismissing her fourth cause of action for retaliation under FEHA.

5. *Fifth Cause of Action for Retaliation (Labor Code)*

Hebert argues her fifth cause of action for retaliation in violation of Labor Code section 1102.5 is supported by the evidence. The statute was amended in 2014. (Stats. 2013, ch. 781, § 4.1.) In 2013, Labor Code section 1102.5, subdivision (b) prohibited an employer from retaliating against an employee who reveals a violation of state or federal law or regulation to a governmental agency. (*Rope v. Auto-Chlor System of Washington*,

Inc. (2013) 220 Cal.App.4th 635, 648, superseded by statute.) It did not protect internal complaints. (*Id.* at p. 649.) “Statutes operate prospectively unless they contain an express retroactivity provision, or it is ‘ “very clear” ’ that the Legislature intended the statute to operate retroactively.” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 246.) My Friends argues the amendment does not apply retroactively to Hebert’s claims, and Hebert does not offer any response to this assertion. Nonetheless, Hebert’s argument is once again undone by her failure to cite to any actual evidence in support of her claim. For instance, Hebert asserts My Friends was aware she made a complaint to the State Department of Public Health and that management took no action to investigate her allegations. Both statements are contrary to the evidence cited by My Friends. Hebert does not fulfill her burden to demonstrate reversible error by suggesting without citation to the record that the opposite is true.

III. DISPOSITION

The judgment is affirmed. Respondent Specialized Daycare Services, Inc. shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

DUARTE, J.